United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

with affidavit

75-6001

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6001

PPG INDUSTRIES, INC.,
Plaintiff-Appellee,

—against—

THE HARTFORD FIRE INSURANCE COMPANY, NEW YORK STATE TAX COMMISSION, STATE OF NEW YORK, CAR COLOR, INC. and HENKIN & HENKIN, ESQS.,
Defendants,

—and—

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S PETITION FOR REHEARING

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellant, United States of America.

PATRICK H. BARTH,
STEVEN J. GLASSMAN,
WILLIAM C. BALLAINE,
Assistant United States Attorneys, Of Counsel.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6001

PPG INDUSTRIES, INC.,
Plaintiff-Appellee,

—against—

THE HARTFORD FIRE INSURANCE COMPANY, NEW YORK STATE TAX COMMISSION, STATE OF NEW YORK, CAR COLOR, INC. and HENKIN & HENKIN, ESQS.,
Defendants,

—and—

UNITED STATES OF AMERICA,
Defendant-Appellant.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING

Preliminary Statement

The appellant, United States of America ("Government"), requests, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, that the Court grant a petition for rehearing in this case for the following reasons.

One, we respectfully submit that the Court misapprehended the meaning and effect of 26 U.S.C. § 6323(c) and 26 U.S.C. § 6323(h)(1).

Two, we respectfully submit that the Court overlooked the effect of its holding on N.Y.U.C.C. § 9-104(g), and, in fact, judicially amended the plain language of this provision.

Three, we respectfully submit that the record does not support a Judgment adverse to the Government consistent with the Court's holdings.

It is respectfully submitted that the Court's perception of the equities involved was the well spring of the Court's Opinion of February 13, 1976. The Court's view was that the Government was unfairly seeking the fruits of the appellee PPG's prudence. In reaching this conclusion, which is not supported by the record, the Court has interjected into tax lien priority disputes the highly subjective element of a taxpayer's intent in securing an insurance policy—a policy which was secured some five years ago by the taxpayer Car Color, which is no longer in business. Although difficulty of proof with its attendant expenses is not a justification for eliminating the issue of intent from tax lien priority disputes, it is equally clear that Congress intended that priorities be determined by reference to identifiable events rather than by proof of effervescent intentions.

A. The Court Misapprehended 26 U.S.C. § 6323(c) and 26 U.S.C. § 6323(h)(1)

The Court held that the "*existence* of an available insurance policy" satisfied the existence requirements of 26 U.S.C. § 6323(h)(1)(A) and that, alternatively, the insurance policy fell within those categories of "non-existent property which are listed in 26 U.S.C. § 6323(c)." Slip Op. at 1909, 1909 n.6. It is respectfully submitted that those holdings are incorrect and, indeed, are at odds with each other.

The Government argued that 26 U.S.C. § 6323(h)(1)(A) required the existence of the *proceeds* of the insurance policy prior to the filing of the Government's tax liens. The Court granted that this construction was "persuasive in a technical sense. . . ." Slip Op. at 1909. It is submitted that lien priority disputes are of necessity "technical" disputes and that the Government's "technical" argument must prevail. Prior to the filing of the tax liens, PPG's interest in the available insurance policy was no more than an undetermined future right or interest in the proceeds of the policy which came into existence after the Government filed its tax liens. The Court, we submit, has undermined the concept of "existence" as it is set forth in 26 U.S.C. § 6323(h)(1)(A).

The Court's holding that the available insurance policy satisfied the requirements of 26 U.S.C. § 6323(c) underscores the Court's apparent misapprehension of the concept of existence. The Government had argued that section 6323(c) expressly set forth those categories of non-existent property which were to be granted priority status. Since an insurance policy did not appear to come under any of the provisions of section 6323(c), the Government argued that the insurance policy was not protected. To borrow the Latin phrase, "*expressio unius est exclusio alterius.*" The Court's alternative holding that the insurance fit within the exceptions for non-existent property listed in section 6323(c) necessarily recognized the validity of the Government's position that the insurance policy was "non-existent" prior to the filing of the tax liens. The Government submits that the insurance policy cannot be characterized as "existent" for the purposes of section 6323(h)(1) and as "non-existent" for the purposes of section 6323(c).

Assuming *arguendo* that the insurance policy was protected by 26 U.S.C. § 6323(c), PPG's interest in the policy could not, as a matter of law, have been superior to the filed tax liens because 26 U.S.C. § 6323(c)(2)(B)

requires that the property protected by section 6323(c) must be "*acquired* by the taxpayer before the 46th day after the tax lien filing." (Emphasis added). The proceeds of the policy did not come into existence until April 25, 1973, a date some eleven months after the Government filed its tax liens, and, therefore, could not have been protected by Section 6323(c).

It is submitted that the property in question did not come into existence until April 25, 1973 and was not protected by 26 U.S.C. § 6323(c). Therefore, the Government's tax liens have priority over PPG's interest in the proceeds of the insurance policy.

B. The Court Judicially Amended N.Y.U.C.C. § 9-104(g)

Although the Court recognized that "a literal reading . . ." of N.Y.U.C.C. § 9-104(g) supported the Government's position that section 9-104(g) excluded insurance policies from protection under New York's Uniform Commercial Code, the Court, nevertheless, held that PPG had a security interest in the proceeds of the insurance policy. Slip Op. at 1904, 1907. In reaching the conclusion that this Court was not bound by the literal or exact meaning of a New York legislative enactment, the Court relied on amendments to the U.C.C. which were proposed by the Commissioners on Uniform State Laws and which have not been adopted in New York.*

---

* The New York law revision commission is charged with the duty of examining such proposals and reporting their recommendations to the legislature. N.Y. Legislative Law § 72 (McKinney 1952). In 1974, the commission included the subject of "Revision of Article 9 of the Uniform Commercial Code" as a proposal for future consideration. *See* 1974 McKinney's Session Laws of New York 1877, 1887. In 1975, the commission deferred further action on this subject for subsequent study. *See* 1975 McKinney's Session Laws of New York, at A-74, A-85 (Apr. 25, 1975) (No. 2).

The Government submits that the Court has exalted the Commissioners on Uniform State Laws to a higher status than the legislature of the State of New York. The precedential effect of this approach transcends the facts of this case. For example, both Connecticut and Vermont have U.C.C. provisions which are substantially identical to those of New York. *See* Conn. Gen. Stat. §§ 42a-9-104, 9-306; 9A Vt. Stat. §§ 9-104, 9-306. Apparently, the same conclusion reached by the Court here would prevail in a case involving Connecticut or Vermont law. Moreover, since the Commissioners on Uniform State Laws have also recommended various other changes to Article 9, the precedential impact of the Court's holding could support an argument that the proposed changes to existing law are actually what the various state legislatures initially intended to enact. Without intending any criticism of the efforts of the Commissioners to improve or modify their past efforts, the Commissioners do not have the stature of a legislative body. Yet, in effect, we respectfully submit that this Court has elevated them to this legislative role.

The Government submits that the views of the Commissioners on Uniform State Laws are subordinate to the literal or exact meaning of N.Y.U.C.C. § 9-104(g) and that, as a matter of law, PPG could not have had a security interest in the proceeds of the insurance policy.

C. The Record Does Not Support The Court's Judgment

We respectfully submit that the Court based much of its Opinion on its finding that the "insurance obtained by Car Color was specifically intended to be further security for PPG's lien." Slip Op. at 1910 n.7. This finding has no basis in fact.

This case was presented to the District Court after the parties had made their respective motions for summary judgment based on a "Stipulation Concerning Facts." There was no trial. The District Court stated in its Opinion:

> "It is beyond doubt that PPG had a security interest in Car Color's inventory and that the parties intended the proceeds of the insurance on that collateral to be further security for the loan." Joint Appendix at 116.

The Government argued: "This insurance policy was not obtained by Car Color in compliance with . . . [the] security agreement. . . ." Government's Brief at 4. This Court addressed this argument in footnote 7 of its Opinion:

> "[T]he Court is not entirely convinced that the insurance policy taken out by Car Color was the specific one contemplated by the security agreement."

Nonetheless, the Court was "willing to accept" the District Court's conclusion that it was. Slip Op. at 1910 n.7. This finding does not have factual support.

The record merely reflects that Car Color had a fire insurance policy in effect on December 23, 1971 (Joint Appendix at 57) and that Car Color was supposed to insure the collateral, naming PPG as loss payee on the policy. Joint Appendix at 61. A fire insurance policy apparently was acquired by the taxpayer on December 10, 1970, some two months after it entered into a security agreement with PPG. Joint Appendix at 25.* This

---

* This date is set forth in a Memorandum of Law submitted by Car Color's attorneys in a related state court proceeding.

policy covered losses sustained by Car Color as a result of a fire including damages to a wall and to tools. Joint Appendix at 130-31. These facts do not support the District Court's conclusion as to the intent of the parties.

This Court's decision also raised a subsidiary factual issue which remains unresolved. The insurance proceeds in question have not been traced to the taxpayer's inventory of PPG products as required by the proposed amendments to the U.C.C. *See* Government's Brief at 5, 21 n.** To be consistent with its analysis of New York law, the Court should have remanded the case to the District Court for resolution of the issues of intent and for tracing of the insurance proceeds.

CONCLUSION

The Government's petition for rehearing should be granted.

Dated: New York, New York
March 26, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellant,
United States of America.

PATRICK H. BARTH,
STEVEN J. GLASSMAN,
WILLIAM G. BALLAINE,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976— 614—350—148

rm 280 A-Affidavit of Service by Mail
v. 12/75

AFFIDAVIT OF MAILING

CA 75-6001

ate of New York)
unty of New York) ss

Pauline P. Troia, being duly sworn,
poses and says that She is employed in the Office of the
ited States Attorney for the Southern District of New York.

That on the

26th day of March, 19 76 s he served a copy of the

thin deft' applts petition for rehearing

placing the same in a properly postpaid franked envelope

dressed:

Jacob F. Gottesman, Esq.,
295 Madison Ave.
New York, NY

And deponent further
ays she sealed the said envelope and placed the same in the
ail chute drop for mailing in the United States Courthouse Annex,
ne St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

worn to before me this

26th day of March, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977